

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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AIG FINANCIAL ADVISORS, INC., a
Delaware corporation,

Plaintiff,

vs.

JAMES BYONGMIN YIM and JANE DOE
YIM, husband and wife; and MILTON
CHAMPION and PHYLLIS CHAMPION,
husband and wife,

Defendants.

MILTON CHAMPION and PHYLLIS
CHAMPION, husband and wife,

Counterclaimants.

vs.

AIG FINANCIAL ADVISORS, INC., a
Delaware corporation; DOYLE BROWN, an
individual; JANET WEINSTIEN, an
individual.

Counterdefendants.

03:06-CV-0497-LRH (VPC)

ORDER

Presently before this court is Plaintiff's, AIG Financial Advisors, motion to compel arbitration and stay proceedings (#54¹). The Champion Defendants, Milton and Phyllis Champion, have filed an opposition (#65), to which Plaintiff has replied (#68). Also before the court is the Champion Defendants' motion to dismiss for failure to name real parties in interest

¹ References to (#XX) refer to the court's docket.

1 or join indispensable parties (#53). Plaintiff has filed an opposition (#64), to which the
 2 Champion Defendants have replied (#69). Finally, before this court is the Champion
 3 Defendants' motion for production of documents and request for evidentiary hearing regarding
 4 motion to compel arbitration (#70). Plaintiff has filed a response to this motion (#73).

5 **FACTS AND PROCEDURAL HISTORY**

6 The Champion Defendants met Defendant James Byongmin Yim ("Defendant Yim")
 7 when he was affiliated with Morgan Stanley Dean Witter and SunAmerica Securities as an
 8 investment broker. The parties began a business relationship at that time, which ultimately led to
 9 the present lawsuit.

10 In 2004, SunAmerica Securities became affiliated with Plaintiff and Defendant Yim
 11 became one of Plaintiff's independent contractors. As part of that arrangement, Defendant Yim
 12 entered into an arbitration agreement with Plaintiff which provided that any claims or disputes
 13 between Plaintiff and Defendant Yim would be resolved by arbitration. As Defendant Yim
 14 moved to Plaintiff's employ, the Champion Defendants brought their business as well. The
 15 Champion Defendants opened several accounts with Plaintiff.

16 Along with each account opened by the Champion Defendants, a form was signed which
 17 contained an arbitration clause.² This clause read as follows:

18 To the extent permitted by law, all controversies which may arise between the
 19 undersigned and SAS [SunAmerica Securities] or any of their affiliated
 20 companies concerning any transaction arising out of or relating to any account
 21 maintained by the undersigned, or the construction, performance, or breach of this
 22 or any other agreement between us whether entered into prior to, on, or
 23 subsequent to the date hereof, shall be submitted to arbitration conducted under
 24 the Code of Arbitration Procedure of the National Association of Securities
 25 Dealers Regulation, Inc. or the arbitration panel of any other National Securities
 26 Exchange on which a transaction giving rise to the claim took place, as I may
 27 elect.

28 ² The court is aware of the Champion Defendants' argument that they were never
 apprised of the arbitration agreement and that at least one of their signatures may have been
 forged to open an account. The court does not make any factual findings at this point in the
 proceedings relating to these allegations, but merely places these facts forth by way of
 background information. Should the court need to discuss such allegations it will recount the
 Champion Defendants' facts at that time.

1 Despite having several accounts open with Plaintiff, the Champion Defendants had more
2 money they wished to invest. They did so through a private agreement with Defendant Yim that
3 was entered into outside of any relationship with Plaintiff. Through that agreement, the
4 Champion Defendants wrote personal checks to Defendant Yim totaling approximately
5 \$800,000. In return, Defendant Yim was to engage in a commercial real estate transaction.

6 As is often the case in such side dealings, it appears that Defendant Yim's commercial
7 real estate transaction imploded. As a result, Defendant Yim was indebted to the Champion
8 Defendants for a substantial sum of money. Defendant Yim's attempt to repay that debt led
9 directly to the present suit.

10 In order to repay the debt owed to the Champion Defendants, Defendant Yim
11 misappropriated the funds of two of Plaintiff's clients. In multiple, allegedly forged, transfer
12 orders, Defendant Yim caused approximately \$564,000 to be transferred into one of the accounts
13 the Champion Defendants held with Plaintiff. These funds were transferred from the accounts of
14 two of Plaintiff's customers without their knowledge or consent. Once the funds reached the
15 Champion Defendants' account with Plaintiff, approximately \$550,000 was transferred into the
16 Champion Defendants' private account with Wells Fargo Bank. The Champion Defendants
17 claim they were unaware of the funds transferred until they reached the Wells Fargo Account, at
18 which time the Champion Defendants understood the transfer to be payment of the debt owed by
19 Defendant Yim.

20 When Plaintiff was notified by one of its customers that there was a problem with an
21 account, it quickly tracked down what had happened. Plaintiff then filed an arbitration claim
22 against Defendant Yim to recover the funds he had misappropriated. As part of that claim,
23 Plaintiff sought a constructive trust over the Champion Defendants' Wells Fargo Account to
24 ensure the funds would not be lost. With this arbitration claim, Plaintiff filed a concurrent action
25 in this court to obtain a preliminary injunction to protect the funds transferred to the Champion
26 Defendants. A temporary restraining order was entered and has been continued by stipulation of
27 the parties to the current date with the expectation that it would remain in effect until a
28 preliminary injunction hearing could be had.

1 In the proceedings before this court, Plaintiff's sought and obtained a default judgment
2 against Defendant Yim when he failed to respond to the complaint. Plaintiff now seeks to
3 compel all matters to arbitration pursuant to the agreements entered into between Plaintiff and all
4 defendants. The Champion Defendants object to sending this matter to arbitration and seek
5 dismissal of the action for failure to join necessary parties. Further, the Champion Defendants
6 have filed a counterclaim against Plaintiff for failure to supervise Defendant Yim and failure to
7 prevent Defendant Yim from improperly transferring funds by forging the Champion
8 Defendants' signatures.

9 It also appears to the court that Plaintiff has had at least one of the two customers who had
10 money improperly transferred from their account assign their right to sue to Plaintiff in response
11 to Plaintiff reimbursing that individual's account. Plaintiff noted to the court that it was in the
12 process of obtaining the other account holder's rights, but to date the court has no notice whether
13 such an action was completed.

14 DISCUSSION

15 The court notes that multiple motions are pending. However, should the court compel
16 arbitration in this matter, the remaining motions will become moot. As such, the court will first
17 consider whether compelling arbitration is appropriate and, if it is not, will then reach the
18 remaining motions.

19 1. Motion to Compel Arbitration

20 The Federal Arbitration Act provides that agreements to arbitrate disputes in commercial
21 settings "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in
22 equity for the revocation of any contract." 9 U.S.C. § 2. While this statute has been interpreted
23 according to a "liberal federal policy favoring arbitration agreements," *Howsam v. Dean Witter*
24 *Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *Moses H. Cone memorial Hospital v. Mercury*
25 *Constr. Corp.*, 460 U.S. 1, 24-25 (1983)), the courts have carefully carved out an exception
26 whereby the gateway questions of arbitrability are first determined by the courts unless the
27 parties have specifically agreed otherwise. *Id.* (quoting *AT&T Technologies, Inc. v.*
28 *Communications Workers*, 475 U.S. 643, 649 (1986)). One question of arbitrability generally

1 reserved to the courts is a determination whether “an arbitration clause in a concededly binding
2 contract applies to a particular type of controversy.” *Id.* at 84.

3 The court is not convinced that, even if the Champion Defendants entered into a binding
4 arbitration agreement in relation to the account relevant to this matter, the current dispute would
5 fall within the language of the arbitration agreement. As noted above, the arbitration agreement
6 purportedly signed by the Champion Defendants refers to arbitration all claims “arising out of or
7 relating to any account maintained by” the Champion Defendants.

8 The dispute which led to the present action arose out of Defendant Yim’s improper
9 actions. To be more specific, the true harm sought to be remedied is Defendant Yim’s
10 misappropriation of funds from two of Plaintiff’s customers for the purpose of paying back an
11 independent loan made to Defendant Yim by the Champion Defendants. The actions taken by
12 Yim in removing the funds from two of Plaintiff’s customers do not relate to the Champion
13 Defendants’ accounts. Nor does the ultimate controversy arise from the Champion Defendants’
14 accounts.

15 The court is aware that the funds were initially transferred to one of the accounts the
16 Champion Defendants had with Plaintiff. However, from there the funds were moved to the
17 Champion Defendants’ personal Wells Fargo Account; a transfer apparently made without the
18 Champion Defendants’ knowledge. As such, all claims against the Champion Defendants, which
19 are based on the equitable principle that improperly gained funds should be preserved to ensure
20 recovery, focus on ensuring the funds remain in the Champion Defendants’ personal Wells Fargo
21 Account until they can be returned to Plaintiff. The court sees no manner in which such a dispute
22 can be said to arise out of or relate to the account the Champion Defendants hold with Plaintiff.

23 The court recognizes that the claims against the Champion Defendants are ancillary to
24 those against Defendant Yim; recovery of the funds from the Champion Defendants is predicated
25 on demonstrating they were improperly transferred to the Champion Defendants by Defendant
26 Yim. Further, the court is aware that the dispute between Plaintiff and Defendant Yim is subject
27 to arbitration pursuant to the independent contractor agreement between Plaintiff and Defendant
28 Yim. However, the arbitrability of the dispute with Defendant Yim does not necessitate

1 arbitration of the ancillary matters involving the Champion Defendants. It is a fundamental
2 principle of arbitration agreements that one cannot be forced to arbitrate a dispute they have not
3 agreed to arbitrate. *See e.g., John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964)
4 (“The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot
5 precede judicial determination that the [arbitration agreement] does in fact create such a duty.
6 Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate,
7 so a fortiori, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all.”).
8 Since there is no agreement between Plaintiff and the Champion Defendants which would
9 compel arbitration of this specific dispute, the Champion Defendants cannot be forced to
10 arbitration.

11 2. *Motion to Dismiss and Motion for Production of Documents*

12 Having determined that arbitration is not appropriate in this matter, the court now
13 considers the remaining pending motions. The Champion Defendants have filed a motion to
14 dismiss based on the premise that Plaintiff is not the real party in interest. The Champion
15 Defendants have also filed a motion for production of documents and a request for an evidentiary
16 hearing for the purpose of determining whether Plaintiff is the real party in interest. Plaintiff has
17 contested the discovery motion on the ground that the matter should be compelled to arbitration -
18 a ground the court has rejected.

19 The discovery motion was filed when it became apparent that Plaintiff had been seeking
20 to gain an assignment of rights from the two customers who had been victimized by Defendant
21 Yim’s actions. The Champion Defendants recognize that a proper assignment of rights would
22 moot their motion to dismiss. Specifically, the Champion Defendants write in the conclusion of
23 their reply brief on the motion to dismiss that, given the assignments alleged by Plaintiff,
24 Plaintiff “may now be able to satisfy diversity jurisdiction and pursue [the pending claims] in
25 federal court.” However, the Champion Defendants seek proof of the assignments if they are to
26 accept Plaintiff’s statements.

27 The court agrees with the Champion Defendants’ summary of the situation before the
28 court. Given that arbitration is not appropriate, it becomes important to determine whether the

1 proper parties are before the court. While the court notes that Plaintiff has provided several
2 arguments which could provide a tenable basis for concluding that they are a proper party to
3 bring the present lawsuit, there has been little to no discovery on the issue of assignment.

4 Thus, the court will deny the Champion Defendants' motion to dismiss without prejudice
5 and grant the request for production of documents relating to the assignment of claims to
6 Plaintiff. An evidentiary hearing, however, is not needed at this time.

7 **CONCLUSION**

8 The court concludes that, even if a valid arbitration agreement exists between Plaintiff
9 and the Champion Defendants, the arbitration agreement provided would not cover the dispute
10 before the court. This matter focuses on Defendant Yim's actions and his inappropriate removal
11 of funds from two of Plaintiff's customers' accounts. While Defendant Yim transferred those
12 funds through accounts with Plaintiff in the Champion Defendants' names, the money was not
13 noticed by the Champion Defendants until it reached their personal Wells Fargo Account. As
14 such, it cannot be said that the present dispute between Plaintiff and the Champion Defendants
15 arises out of or is related to their account with Plaintiff. Thus, the present dispute is not
16 arbitrable under the parties' purported agreement.

17 Given that arbitration is not appropriate, the remaining pending motions become ripe for
18 decision. However, the Champion Defendants' motion to dismiss may have become moot based
19 on actions taken by Plaintiff to gain an assignment of legal rights from the customers that were
20 affected by Defendant Yim's actions. As such, the court need not consider the Champion
21 Defendants' motion to dismiss at this time. Further, the court will allow limited discovery to
22 determine whether the Champion Defendants' arguments have indeed become moot.

23 It is therefore ORDERED that Plaintiff's Motion to Compel Arbitration (#54) is
24 DENIED;

25 It is further ORDERED that the Champion Defendants' Motion to Dismiss (#53) is
26 DENIED without prejudice;

27 It is further ORDERED that the Champion Defendants' Motion for Production of
28 Documents and Request for Evidentiary Hearing (#70) is GRANTED in part and DENIED in

1 part;

2 The Champion Defendants shall be entitled to additional discovery, limited to
3 determining whether Plaintiff has properly obtained the assignment of its customers' legal rights
4 against Defendant Yim. However, the Champion Defendants' request for an evidentiary hearing
5 is denied without prejudice.

6 DATED this 22nd day of June, 2007.

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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE
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